ADSIGNS IMEJ SDN BHD A

v.

YAYASAN SELANGOR

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER J
[SUIT NO: D-22NCC-2327-2010]
16 FEBRUARY 2011

CONTRACT: *Breach - Site agreement - Specific performance - Extension of agreement - Damages - Terms of agreement, non-compliance of - Whether there was breach - Whether claim for damages not maintainable* C

CIVIL PROCEDURE: *Costs - Taxation - Allocatur fees - Whether costs subject to payment of allocatur when assessed and fixed by court - Issuance of certificate by registrar - Payment of allocatur upon extraction of order for costs* D

The plaintiff and defendant entered into a Site Agreement dated 28 February 2008 ('agreement') in which the plaintiff was given E licence to erect and affix advertisement panels on the front facade of the defendant's building for a rental per annum. There was an obligation for the defendant to extend the agreement for a further two years at a revised rental rate of no more than 10%, provided the plaintiff complied with all the terms of the agreement. The F plaintiff subsequently sought an extension but the defendant refused without providing any reasons. Hence, the plaintiff filed the present claim seeking, *inter alia*: (a) specific performance of the agreement; (b) that the agreement be extended for two years commencing from 1 January 2011 until 31 December 2012 at a G revised rental rate of no more than 10%; and (c) damages in addition to or *in lieu* of specific performance. The defendant, on the other hand, counterclaimed for vacant possession and double rental. The court, in addition to deliberating upon the plaintiff's claim and the defendant's counterclaim, also considered the issue H of allocatur fees in respect of costs in the present case.

Held (allowing prayers (a) and (b) of the plaintiff's claim; dismissing the defendant's counterclaim):

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(1) The plaintiff's claim must be partly allowed and the defendant's counterclaim dismissed for, *inter alia*, the following reasons: (i) the explicit terms of cl. 5.3 of the agreement made

A it clear that the defendant had no unilateral right to terminate for breach or non-performance without giving 14 days notice to remedy the breach. The non-compliance of cl. 5.3 made the defence and the counterclaim frivolous, vexatious and an abuse of the court's process. There was no breach, taking into B consideration cl. 5.3; (ii) cl. 5.3 restricted the plaintiff's right to damages. The plaintiff was entitled to terminate the agreement and claim damages if the defendant did not want to perform its obligation, but cl. 5.3 did not permit the plaintiff to claim damages as well as specific performance; and (iii) C additionally, the plaintiff had not informed the defendant of any claim for damages or led evidence of mitigation *etc*, to award damages. The claim for damages, on the facts, was not maintainable. *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd* (foll). (paras 9 & 10)

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(2) If the rules of court have provided for fixed costs, then the fixed costs is what the parties may claim and it is not a subject matter of taxation and/or allocatur unless the rules say otherwise. However, if the court assesses and fixes the costs E then it is subject to the payment of allocatur fees. Since the allocatur is the amount of money paid to the government as government revenue, it is the court's duty when it has assessed and fixed costs to order the registrar to issue the certificate in relation to allocatur and ensure the allocatur is F paid at least when the order for costs is extracted. Failure to do so will lead to loss of revenue in millions or billions, and it is the court's duty to arrest such omission *in limine*. Therefore, the following orders were made: (i) the order for costs may be extracted as a separate order upon the payment of allocatur; G (ii) the defendant to pay the plaintiff costs in the sum of RM50,000 for the claim as well as the counterclaim; and (iii) the registrar to issue the certificate relating to allocatur. (paras 12 & 14)

H **Case(s) referred to:**

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd [2010] 1 LNS 206 HC ***(foll)***

Re Teoh Heng Han; Ex p OCBC Bank (M) Bhd [2010] 9 CLJ 328 ***(foll)***

Legislation referred to:

I Rules of the High Court 1980, O. 59 rr. 9(4), 12

Other source(s) referred to:

Taxation of Costs [1998] 1 MLJ xli

For the plaintiff - Oommen Koshy (Ong Doen Xian with him); M/s Skrine
For the defendant - Isa Aziz Ibrahim (Darren Malis Isik Jefferson with him); M/s Ranjit Ooi & Robert Low

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's claim for specific performance and damages and the defendant's counterclaim for vacant possession and double rental etc. The prayers in the statement of claim *inter alia* read as follows:

(a) specific performance of the Site Agreement dated 28.2.2008;

(b) that the Site Agreement be extended for 2 years commencing from 1.1.2011 until 31.12.2012 at a revised rental rate of no more than 10%;

(c) damages in addition to or *in lieu* of specific performance.

Costs And Allocatur Fees

[2] I have also invited the parties to submit as to costs as it is now the practice of the court to assess costs and thereafter fix costs at the end of hearing to avoid taxation formalities which often takes much of the court's time. This new practice of fixing costs *in lieu* of the full procedure of taxation is presently in vogue not only in the High Courts, but also in the Court of Appeal and the Federal Court. I realize by fixing costs and not directing 'allocatur fees' to be paid in actual fact leads to loss of revenue which may be in millions or billions. The fixing of costs procedure by the judge in almost all cases takes into consideration all the requirements which are essential to compute costs in the ordinary process of taxation save that the formalities of filing of papers are not essential. In consequence it will be appropriate to order allocatur fees to be paid on the extraction of the order of costs. To determine whether such an order should be made I invited both parties to submit whether the court can make two separate orders whether it is related to an application or full trial – the first being the usual order in the terms prayed for by the party, and the second being a separate order for fixed costs with an allocatur fees to be payable at the time of extraction of the order with a

direction the registrar to issue the registrar's certificate relating to the allocatur fees, to satisfy the requirements of O. 59 of RHC 1980.

Brief Facts Of Case

[3] The plaintiff has been given license to erect and affix advertisement panels on the front façade of the defendant's building for a rental per annum. There was an obligation for the defendant to extend the agreement for further two years at a revised rental rate of no more than 10% provided the plaintiff has complied with all terms of the agreement, *inter alia* (a) the plaintiff shall obtain all such approvals before commencing construction of the Signage from the relevant authorities; and (b) the plaintiff shall obtain all such approvals, license or consent for the display of the advertisement on the Signage on the said Site from the relevant authorities.

[4] The plaintiff sought for an extension as per the agreement but the defendant refused without stating any reasons. In this action the defendant says:

1. Based on the Defendant's record, the Plaintiff had only submitted one license and that the only license that was obtained by the Plaintiff for the Signage had already expired. The said license was only valid for 3 months commencing from 24.5.2010 until 23.8.2010;

2. The Plaintiff did not provide any other valid license from the commencement of the Site Agreement on 1.1.2008;

3. The Plaintiff's failure to renew the license for the said signage is deemed as an act that constitutes default of the terms of the said Site Agreement;

4. The default of the terms of the Site Agreement expressly and/or impliedly by the Plaintiff is deemed as a breach of the Site Agreement thus terminating and/or revoking the Site Agreement between the Plaintiff and the Defendant;

5. The Plaintiff's acts of not obtaining the license required and evidence of non-compliance with all relevant laws clearly shows that the Plaintiff has no rights to claim any remedy based on equity.

[5] The statement of agreed facts (encl. 12) reads as follows:

1. The Plaintiff is a company incorporated under the laws of Malaysia with a registered address at C-8-1, Megan Avenue 1, 189 Jalan Tun Razak, 50400 Kuala Lumpur.

2. The Defendant is a company incorporated under the laws of Malaysia with a registered address at Tingkat 18, Menara Yayasan Selangor, No. 18A Persiaran Barat, 46000 Petaling Jaya, Selangor Darul Ehsan.

3. The Defendant was and is at all material times a government agency of the state of Selangor Darul Ehsan where its trustees consist of members of the State Exco headed by YAB Chief Minister of Selangor.

4. The Plaintiff and Defendant entered into a Site Agreement dated 28.2.2008.

5. The Site Agreement contained express and/or implied terms which the parties were required to abide by at all material times and throughout the duration of the Site Agreement.

6. The first term of 3 years is to expire on 31.12.2010.

7. The Plaintiff is responsible for obtaining licenses for the display of advertisements on the Signage on the Site pursuant to clause 2.2 of the Site Agreement.

8. The Plaintiff had by a letter dated 18.8.010 made a request to the Defendant for the Site Agreement to be extended by a further term of 2 years.

9. By a letter dated 1.9.2010, the Defendant replied to the Plaintiff stating that it was not interested in extending the Site Agreement.

10. By a letter dated 21.9.2010. The Plaintiff's solicitors issued a letter of demand to the Defendant demanding confirmation of an extension of the Site Agreement and a proposed revised rental rate at no more than 10%.

[6] The issues to be tried (encl. 13) read as follows:

1. Whether the Plaintiff is entitled to an extension of the Site Agreement for 2 years commencing from 1.1.2011 until 31.12.2012 at a revised rental rate of no more than 10%.

2. Whether the Plaintiff had breached the terms of the Site Agreement, namely in failing to obtain licenses from MBPJ for the display of advertisements on the Signage on the Site.

3. Whether the Plaintiff is entitled to damages in addition to or *in lieu* of specific performance.

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4. Whether the Defendant is entitled to an order for vacant possession of the Site commencing from 1.1.2011.

5. Whether the Plaintiff is liable to pay special damages in the form of double the monthly rental rate of RM 6,000.00 per month from 1.1.2011 until vacant possession of the Site is given to the Defendant pursuant to Section 28(4)(a) of the Civil Law Act 1956.

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Preliminaries

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[7] One witness gave evidence for the plaintiff and the General Manager of the defendant gave evidence for the defendant.

[8] The plaintiff gave evidence to say that at all material times they have not breached any of the terms and the defendant did not show any evidence of any complaint to the plaintiff of any breach or request to remedy the breach notwithstanding cl. 5.3 of the agreement requires them to do so. The said clause reads as follows:

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> Notwithstanding the terms of this Agreement, in the event there is a breach or non-performance of the terms and covenants contained herein (save and except Clause 5.2.2 hereof) by any party hereto, the innocent party must give a Fourteen (14) days' notice to the party in breach or non-performance of this Agreement to remedy the said breach of non-performance to the satisfaction of the innocent party, failing which the innocent party shall be entitled to terminate this Agreement forthwith and claim such damages as permitted by law from the party in breach or non-performance of this Agreement …

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[9] I have heard the evidence, read the documents, and submission of the parties in detail. Learned counsel have submitted on the evidence and law comprehensively. I do not wish to repeat the same save to deal with the core issues. I take the view the plaintiff's claim must be partly allowed and the defendant's counterclaim must be dismissed. My reasons *inter alia* are as follows:

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(a) It is clear from the explicit terms of cl. 5.3 of the agreement the defendant has no unilateral right to terminate for breach or non-performance without giving 14 days notice to remedy the breach. The non-compliance of cl. 5.3 of the agreement makes the defence and counterclaim frivolous, vexatious and abuse of process of court. In the instant case I agree with the plaintiff that there was no breach taking into consideration cl. 5.3.

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(b) In the instant case the right to damages by the plaintiff is restricted by cl. 5.3 of the agreement. In the event the defendant did not want to perform its obligation the plaintiff is entitled to terminate the agreement and claim damages. This clause does not permit the plaintiff to claim damages as well as specific performance.

(c) In addition, in the instant case the plaintiff has not informed the defendant of any claim for damages, or led evidence of mitigation etc to award damages. The claim for damages in my view on the facts of the case is not maintainable. In *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd* [2010] 1 LNS 206, I have dealt with this area of jurisprudence and made the following observation:

> In the instant case, the evidence relating to quantum was speculative. And whatever said in evidence to support the claim for damages was not within the contemplation of parties. In addition, no prior notice was given immediately to the defendant after the letter dated 26.4.1996 relating to proposed claim against the defendant. No evidence was led to show what steps were taken to mitigate the loss. And the whole evidence on quantum was substantially based on the evidence of PW2 which I have found as unreliable. It is trite that the loss of profits on a contract of which the defendant had no notice is clearly too remote. The statutory enunciation of the rule in *Hadley v. Baxendale* is found in section 74 of Contract Act 1950. It is my finding that the plaintiff's evidence relating to quantum does not satisfy the rudimentary requirement set out in section 74 to award damages.

[10] The above case was recently affirmed by the Court of Appeal.

For reasons stated above I allow the plaintiff's prayers (a) and (b) and dismissed the defendant's counterclaim.

Costs

[11] I have heard the parties in respect of costs. I am grateful to the learned counsel for having guided the court on the issue of allocatur. Both the learned counsel take the view that the rules are silent in the event the court fixes the costs and the issue of allocatur will usually arise if the matter is referred to the registrar for taxation; and that does not necessarily mean the court cannot direct allocatur to be paid when fixing costs.

[12] In my view if the rules of court has provided for a fixed costs then the fixed costs is what the parties may claim and is not a subject matter of taxation and/or allocatur unless the rules says otherwise. However, if the court assesses and fixes the costs then it is subject to the payment of allocatur fees. My reasons *inter alia* are as follows:

(a) The object of awarding costs to the litigant is to indemnify him for the expenses he had incurred in successfully establishing his legal rights. Order 59 of the Rules of the High Court 1980 provides that costs of incidental proceedings in an action shall be at the discretion of the court. The court shall have full power to determine by whom and to what extent the costs are to be paid. The discretion of the court is very wide, but it has to be exercised judicially and on established principles. Costs awarded by court is subject to allocatur if the court has assessed costs and the allocatur fees stands as a form of revenue for the government.

(b) Taxation, in the context of O. 59 means – assessment of costs. Whether costs is assessed by the judge or registrar makes no difference except as to the procedure and methodology. When costs are assessed before the registrar the formalities under O. 59 must be satisfied and the registrar is obliged to look into *inter alia* the relevant items in Appendix 1 to assist in the assessment process. When a judge assesses costs, ie, attempts to fix costs, the formalities stated in O. 59 need not be complied with though the judge is obliged to consider all issues relating to Appendix 1 to assess costs. This means that the judge has to consider all items of taxation inclusive of getting up fees and other relevant provisions relating to taxation as set out in O. 59 of RHC 1980.

(c) By reading the provisions of Courts of Judicature Act 1964 and the Rules of Court it is clear that the registrar cannot have more powers than the judge and the registrar is merely delegated in a limited sense to exercise the powers of the judge as provided by law, subject to the proviso all decision of the registrar is subject to appeal. I have dealt with this area of jurisprudence in *Re Teoh Heng Han; Ex p OCBC Bank (M) Bhd* [2010] 9 CLJ 328. I do not wish to repeat the same.

(d) When the judge attempts to assess and fix costs he would have to consider all the relevant matters which need to be considered relating to taxation in relation to Appendix I of O. 59 of RHC 1980 etc;. The judge cannot simply pluck a figure to determine costs. It is also the duty of counsel to bring to the attention of the court, the fair amount in relation to costs taking into consideration Appendix I of O. 59 of RHC 1980, before the court fixes the costs. Failure of the counsel to submit on costs does not prohibit the court from fixing the costs. (See O. 59 r. 9(4) of RHC 1980).

(e) When the matter is referred to taxation the registrar is only exercising the powers vested in the judge and it cannot be said otherwise taking into consideration the various provisions in the CJA 1964 and the general jurisprudence relating to costs. This view is further fortified by O. 59 r. 12 which says the Registrar shall have power to tax.

(f) If the judge has already assessed costs the only matter which the registrar needs to do under O. 59 will be that to issue the allocatur ie, the registrar will add a fee for the purpose of extracting the registrar's certificate referred to as allocatur relating to costs. The rules provide that the registrar will issue the allocatur ie, the Registrar's Certificate for the amount probably payable to the taxing party with the seal of court. This does not mean where the judge fixes costs he cannot direct the registrar to issue the allocatur as he has already dealt with all other issues relating to taxation whilst deciding to fix costs. In essence the judge has done what ever need to be done by the registrar dealing with taxation save as to issue of the registrar's certificate in relation to allocatur.

(g) The procedure and methodology for taxation and computing allocatur has been captured in the article *"Taxation of Costs"* [1998] 1 MLJ xli; where it was stated:

> Allocatur is item 78 of Appendix B. The formula used to calculate the allocatur is 8% of amount allowed + RM6. The allocatur is the amount of money paid to the government as government revenue. The amount allowed must always be rounded off to the next RM50, for example where RM1,010 was allowed, the RM10 is to be rounded up to RM50 which means the amount of allocatur is 8% of RM1,050 + RM6. This is because of the wordings of item 78(b) which states where the amount allowed exceeds

A RM50 for every additional RM50 allowed or fraction thereof. In practice, many registrars fail to round up the amount of taxed costs allowed to the next RM50 thereby resulting in a wrong calculation for the amount of allocatur to be paid.

B What is important to note here is that the allocatur is the amount of money paid to the government as government revenue. In consequence there is a duty upon court when it has assessed and fixed costs to order the registrar to issue the certificate in relation to allocatur and ensure the allocatur is C paid at least when the order for costs is extracted. Failing to do so will lead to loss of revenue in millions or billions and it is the duty of court to arrest such omission *in limine*.

(h) I have taken into consideration that it is prudent to order D that the parties have the liberty to file the order for costs separately. This is so because if there is an appeal and the apex court reverses the decision of the High Court then the allocatur paid may not be refundable.

E **[13]** *En Passant* I will say that revenue collected by way of allocatur should be used directly to fund legal aid services etc; and this may encourage the Bar Council to make sure that solicitors advise the clients to pay the allocatur promptly and extract the order for costs, so that it can be productively used to do legal F aid work and generate revenue.

[14] For reasons stated above save for the above paragraph, I make the following orders:

(i) the order for costs may be extracted as a separate order upon G the payment of allocatur;

(ii) the defendant to pay the plaintiff costs in the sum of RM50,000 for the claim as well as the counterclaim;

(iii) the registrar to issue the certificate relating to allocatur. H

I hereby order so.

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